

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

DARREL WAYNE VANDERGRIFF,

Plaintiff,

v.

TONY GAMBONE,

Defendant.

Case No. C06-5381RBL

REPORT AND  
RECOMMENDATION

**NOTED FOR:  
April 27, 2007**

This Civil Rights action, brought under 42 U.S.C. 1983, has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). The plaintiff has been granted leave to proceed *in forma pauperis*.

Before the court is plaintiff's motion for summary judgment filed pursuant to Fed. R. Civ. P. 56 (a) (Dkt. # 44).

FACTS

There is one claim and one defendant remaining in this action. The remaining claim involves medical treatment provided to Mr. Vandergriff in May of 2005. All other claims and defendants

1 were dismissed at the 12 (b) stage for failure to exhaust administrative remedies (Dkt. # 41).

2 The court dismissed the other defendants and claims on December 13, 2006 (Dkt. # 41).  
3 Defendant Gambone did not file a timely answer. On February 5, 2007, the court entered an Order  
4 to Show Cause as the case was not proceeding (Dkt. # 42).

5 On February 28, 2007, Mr. Vandergriff filed this motion for summary judgment as the  
6 remaining defendant (Gambone) was in default. Five days later an answer was received and a  
7 scheduling order has been issued (Dkt. # 46 and 48).

#### 8 DISCUSSION

9 Default is disfavored. The test used in the Ninth Circuit has three factors. The three factors are:  
10 (1) whether the plaintiff has been prejudiced; (2) whether the defendants have a meritorious defense; and  
11 (3) whether or not culpable conduct led to the default. Falk v. Allen, 739 F.2d 461, 463 (9<sup>th</sup> Cir. 1985).

12 The test used by the Ninth Circuit assumes service was proper. Here, defendant avers it has  
13 not been properly served and plaintiff does not address that argument. Default at this juncture would  
14 not be proper. The plaintiff's motion must be **DENIED**. Ninth Circuit is three factored. The three  
15 factors are: (1) whether the plaintiff has been prejudiced; (2) whether the defendants have a meritorious  
16 defense; and (3) whether or not culpable conduct led to the default. Falk v. Allen, 739 F.2d 461, 463  
17 (9<sup>th</sup> Cir. 1985).

18 The test used by the Ninth Circuit assumes service was proper. Here, there is no indication  
19 plaintiff has been prejudiced by the two-month delay in filing an answer. The court noticed the delay  
20 in the case and entered an Order to Show Cause. That order precipitated the current motion and the  
21 filing of an answer.

22 It is too soon to determine if defendant Gambone has a meritorious defense, however the  
23 court notes he has denied that plaintiff is entitled to relief and has raised a number of affirmative  
24 defenses (Dkt # 46).

25 There is no indication the defendant or counsel were culpable in not filing a timely answer.  
26 The motion for summary judgment should be **DENIED**. A proposed order accompanies this Report  
27 and Recommendation.

1 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the  
2 parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed.  
3 R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
4 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule  
5 72(b), the clerk is directed to set the matter for consideration on **April 27, 2007**, as noted in the  
6 caption.

7  
8 DATED this 28 day of March, 2007.

9  
10 /S/ J. Kelley Arnold  
11 J. Kelley Arnold  
12 United States Magistrate Judge  
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